

**NOT FOR PUBLICATION WITHOUT APPROVAL
OF THE COMMITTEE ON OPINIONS**

Kathleen Janes, et al.,	:	SUPERIOR COURT OF
	:	NEW JERSEY
Plaintiffs,	:	LAW DIVISION
	:	MIDDLESEX COUNTY
v.	:	CIVIL ACTION
	:	DOCKET NO. L-1669-01
CIBA-GEIGY Corporation, et al.,	:	MASS TORT CODE 248
	:	
Defendants,	:	CIVIL ACTION
	:	

OPINION

Argued: May 10, 2002
Decided: May 16, 2003

Allan Kanner for plaintiffs (Allan Kanner & Associates, P.C.)

David W. Field for defendants (Lowenstein Sandler, P.C.)

CORODEMUS, J.S.C.

Presently before this court are Plaintiffs' motion for class certification pursuant to Rule 4:32-1 and Defendants' motion for summary judgment pursuant to Rule 4:46-1 to dismiss Plaintiffs' claims as barred by the applicable statute of limitations, N.J.S.A. 2A:14-1. Defendants submit that each of the plaintiffs knew or should have known of their claims long before January 31, 1995, the date six years before the first complaint was filed in this action. For the reasons set forth herein, this court grants Plaintiffs' motion to certify a class for property damages and denies

Defendants' motion for summary judgment without prejudice pending a Lopez hearing to resolve factual questions relating to the statute of limitations.

I. INTRODUCTION

This litigation arises from contamination caused by CIBA-GEIGY Corporation, CIBA Specialty Chemicals Corporation, Novartis Corporation, and others (collectively the "defendants") manufacturing operations in Toms River, New Jersey.¹ Specifically, between 1960 and 1996 defendant CIBA-GEIGY Corporation operated a plant in Dover Township, New Jersey (the "facility"). Kathleen Janes, Anthony and Lynne Sermarini, and John and Ruth Tomkovich (collectively the "Plaintiffs"), who own or owned three residential properties in the Oak Ridge section of Toms River, New Jersey, claim their properties were damaged from contamination emanating from the facility.

Plaintiffs seek a monetary award for the alleged property damage arising out of contamination from the facility. Plaintiffs have brought claims individually and as putative class representatives for a class of persons, including former and present property owners in the Oak Ridge section of Toms River, who they allege have incurred similar property damage, against the defendants. The amended complaint asserts the following causes of action: (1) Fraud and Fraudulent

¹ On January 12, 2001, the Supreme Court issued an Order directing that all litigation arising out of CIBA-GEIGY's Toms River facility be centralized for discovery purposes in Middlesex County. Plaintiffs filed suit on January 31, 2001. At the Court's initial conference on February 14, 2001, plaintiffs were informed that another class action suit (Kramer v. CIBA-GEIGY Corp.) had been filed. The Kramer plaintiffs sought the establishment of the same medical monitoring fund for the same class of persons but did not seek a monetary award for property damage. The parties in Kramer v. CIBA-GEIGY Corp. agreed in January 2002 to a multi-million dollar settlement. None of the defendants admitted or acknowledged liability.

Concealment; (2) Trespass; (3) Nuisance; (4) Intentional Misrepresentation; (5) Absolute Liability; (6) Strict Liability; (7) Negligence; (8) Equitable Fraud; and (9) Unjust Enrichment.

II. BACKGROUND

Due to the parties' contentions regarding the statute of limitations, it is important to discuss the history of the facility, the contamination in Toms River, and the actions taken by various administrative agencies. This court incorporates any previous findings placed on the record, or in opinion form, to the present findings.

A. History of The Facility

From 1952 until 1996, defendants CIBA-GEIGY Corporation and CIBA Specialty Chemicals operated a dye manufacturing plant in Toms River.² The facility produced anthraquinone-based dyes, azo dyes, epoxy resins, and other specialty chemicals. Waste products from the facility were either stored in nearly 70,000 drums or were treated and pumped through a pipeline to the Atlantic Ocean. In 1980, the New Jersey Department of Environmental Protection required defendant CIBA-GEIGY Corporation to begin groundwater monitoring and drum

² J. R. Geigy began CIBA Specialty Chemicals in 1758 in Basel, Switzerland. Originally, the company traded chemicals and dyes. In 1971, Geigy merged with CIBA, which was also a chemical company. The new entity was named CIBA-GEIGY Ltd.

CIBA-GEIGY Ltd. was a leading worldwide biological and chemicals group. In the late 1990s, CIBA-GEIGY Ltd. merged with Sandoz, a pharmaceuticals company, and formed Novartis. Within a year of the merger, Novartis spun off its specialty chemicals divisions, recreating CIBA Specialty Chemicals, which became operationally independent from Novartis on January 1, 1997.

removal at the plant site. In 1983, the Toms River site was placed on the U.S. Environmental Protection Agency's (EPA) Superfund list.³ The EPA discovered that the waste on the site was leaching into the groundwater below. In 1989, the EPA ordered defendant CIBA-GEIGY Corporation to begin cleaning up the site and the groundwater. Unfortunately, the contaminated groundwater migrated from the site and into the aquifer⁴, which was the main source of drinking water for Toms River at the time. Many residents were exposed to the groundwater contamination.

B. Childhood Cancer Incidence Rises

In the 1990s, the number of children with cancer in the Toms River area seemed to be increasing. In response to the residents' concerns, the New Jersey Department of Health, in 1996, studied the apparent rise in cancer and found that between 1979 and 1995, 90 children in the township were diagnosed with cancer; 23 more than would be expected in the population. Particularly perplexing, the children had developed leukemia, brain, and central nervous system cancers at a

³ Union Carbide was also involved in the original investigation, but is not a party in this suit. In 1971, owners of the Reich Farm had leased part of the property to an independent waste hauler. In December of that year, the owners discovered more than 4,000 waste drums bearing Union Carbide labels that had been dumped on the land. Some of the waste products had been poured into trenches. Between 1972 and 1974, Union Carbide removed drums, trench waste, and contaminated soil. In 1974, the Dover Township Board of Health closed nearly 150 private wells near the Reich Farm after finding contamination, and the homes were permanently connected to an alternate water supply.

Residents in the area believe that the local water company, United Water Toms River, mishandled the water supply when it became evident that it was contaminated, and did not treat the water adequately to make it safe.

⁴ An aquifer is a porous and permeable geologic formation that stores, transmits, and yields significant amounts of water to springs and wells.

rate higher than the national rate. Families were outraged and demanded that the state and federal government investigate.

C. Administrative Agencies Link Contamination to Rise in Childhood Cancer Occurrence

In 1995, the New Jersey Department of Health and Senior Services (NJDHSS) and the federal Agency for Toxic Substances and Disease Registry (ATSDR) evaluated the relationship between the environmental exposures to toxic chemicals and the cases of childhood cancer. The agencies, in cooperation with the local Citizen Action Committee for Childhood Cancer Cluster, developed a Public Health Response Plan (PHRP). “The PHRP’s purpose was twofold: (1) to update and reevaluate information on childhood cancer incidence in Dover Township; and (2) to evaluate possible community exposures to toxic chemicals in the environment, called exposure pathways, in order to generate hypotheses which could be assessed in an epidemiologic study.” M. Berry & P. Haltmeier, *Childhood Cancer Incidence Update: A Review and Analysis of Cancer Registry Data, 1979-2000, for Dover Township (Ocean County, New Jersey)* (2003). Findings of the PHRP evaluation of potential exposure pathways in the community indicated that past releases of toxic chemicals into the environment had resulted in exposure to residents in Dover Township. Id. Because of their findings, ATSDR and NJDHSS concluded that the CIBA-GEIGY Corporation

Superfund site⁵ represented public health hazards due to past human exposures to chemicals due to groundwater contamination that affected both public water wells and private wells used for irrigation. Id.⁶

The study confirmed that “the overall childhood cancer incidence rate in Dover Township was statistically significantly elevated” for the period 1979 through 1995, primarily due to excesses of leukemia (over nine times higher than expected) and brain and central nervous system cancer (11.5 times higher than expected) in female children. M. Berry & P. Haltmeier, *Childhood Cancer Incidence Health Consultation: A Review and Analysis of Cancer Registry Data, 1979-1995 for Dover Township (Ocean County), New Jersey* (1997).

The study conducted by ATSDR and NJDHSS recognized an association between prenatal exposure to the contaminated water from the facility and leukemia in female children, and an association between prenatal exposure to the air from the CIBA-GEIGY plant and leukemia in female children diagnosed prior to five years of age.⁷

D. The Agency Investigations Spawn Lawsuits.

This court is familiar with this controversy, for this is the third phase of litigation arising from contamination emanating from the facility. In Kramer v. CIBA-GEIGY Corp., the plaintiffs sought damages for childhood cancer. In

⁵ A Superfund site is a facility identified by the EPA that the agency believes presents a risk of discharging hazardous substances, within the meaning of CERCLA, into the environment.

⁶ Past air pollution emissions from the CIBA-GEIGY Corporation were also of public health concern. The agencies also concluded that the Reich Farm Superfund site represented a public health hazard.

⁷ The study found no single risk factor to be solely responsible for the rise in childhood cancer.

January 2002, the parties in Kramer agreed to a settlement. In Arent v. CIBA-GEIGY Corp., the plaintiffs sought damages for adult cancer and medical monitoring. The parties also resolved Arent. The defendants did not acknowledge liability in either settlement.

III. CONTENTIONS OF THE PARTIES

The plaintiffs contend that the facility operated by defendant CIBA-GEIGY Corporation in Dover Township between the years 1960 and 1996 caused the contamination of their properties and those of residents in the Oak Ridge neighborhood of Toms River, New Jersey. As a result, in addition to their individual claims, Plaintiffs seek to have this court certify a property damage class representing all owners, past or present, of residential property from 1960 to the present in the Oak Ridge neighborhood.

The defendants oppose certification on two grounds: first, as a matter of law, the class should not be certified because the plaintiffs' complaints, which were filed on January 31, 2001 and March 30, 2001, were not timely filed. Second, the defendants assert that the plaintiffs cannot satisfy the prerequisites for certification set forth in Rule 4:32-1. A greater analysis of the parties' positions and arguments follows.

A. Plaintiffs' Claims And Defendants' Opposition to Certification

The plaintiffs seek class certification. They propose the following class:

All owners, past or present, of residential property

from 1960 to the present in the geographic area of Toms River commonly referred to as the Oak Ridge neighborhood, which is a discrete residential enclave within the following boundaries: Bounded to the East by Winding River; Bounded to the North and West by the CIBA property line and the intersection of the CIBA Property line and Oak Ridge Parkway; Bounded to the Southwest by Tanager Drive and Bonded to the South by the intersection of Tanager with Highway 37 the intersection of HWY 37 and Winding River.

Excluded from the class are the defendants in this action, any entity in which the defendants have a controlling interest, any employees, officers, or directors of defendants, and the legal representatives, heirs, successors, and assigns of defendants.

The proposed class consists of over 400 members. All members of the putative class seek economic damages for property devaluation allegedly caused by the defendants' pollution. All claims are based on New Jersey law and there are no claims based on personal injury. A central component of the plaintiffs' case is that the defendants undertook, and continue to do so, a well-planned, professional campaign of fraud and deception to hide the truth about the nature, extent, and danger of the pollution they released into the Toms River community.

The defendants oppose the plaintiffs' motion for class certification and assert that the plaintiffs' claims are barred by the applicable statute of limitations, N.J.S.A. 2A:14-1.

Defendants argue that the plaintiffs have failed to meet the four threshold requirements set forth in Rule 4:32-1(a). First, the defendants assert that the

putative class does not satisfy the numerosity requirement. The defendants further contend that plaintiffs' class definition is so broad, both temporally and geographically, that it prevents the court from properly considering the numerosity requirement. Moreover, even if the court accepts the plaintiffs' class definition, the defendants argue that the size of this putative class does not necessitate certification especially where the plaintiffs have not shown that joinder is impracticable.

Second, the defendants argue that there are insufficient common questions of law or fact to justify class treatment because there are a myriad of individual claims raised and none of the questions identified by plaintiffs qualify as common questions of law. The defendants contend that the plaintiffs cannot demonstrate that there are common questions of law or fact to justify class certification. Specifically, defendants assert that differences among the individual properties and the respective property owners over the past four decades weigh heavily against commonality. Differences among the putative class members' awareness and understanding of the Toms River contamination and the potential for members of the class having claims against other class members, according to the defendants, render illusory any perceived advantage to class certification.

Third, the defendants contend that the putative class representatives' claims are not typical of all class members, and therefore the putative class representatives cannot adequately protect the interests of the class. In particular, the defendants challenge typicality on three grounds: unclean hands, lack of

interest in the class, and that all claims are barred by the applicable statute of limitations.

According to the defendants, four of the five named plaintiffs have come to court with unclean hands because they failed to disclose their knowledge of the contamination underneath their property when selling or refinancing their homes. The defendants assert that Ruth Tomkovich cannot be a member of the putative class, let alone a class representative; she never lived in, or held an ownership interest in, property in the Oak Ridge section of Toms River.

The defendants also assert that the plaintiffs' claims are time-barred. The defendants' concerns regarding the timeliness of the plaintiffs' complaint is addressed in greater detail in the following section, which focuses on the defendants' motion for summary judgment.

The defendants further claim that the putative class fails to meet the predominance and superiority requirements of Rule 4:32-1(b). The plaintiffs' additional claims of fraud and misrepresentation, nuisance and trespass, negligence, and their various affirmative defenses introduce individualized issues. Furthermore, due to the many alleged individual issues, the defendants assert that they will need full discovery of each class member and separate trials, which dovetails with the defendants' next argument that the class action vehicle is not superior to other methods of resolution. For example, to facilitate resolution of the individual plaintiffs' claims, the defendants suggest the court continue to employ case management, manage consolidated discovery, and use other methods for

managing this case. This court has a record of resolving cases more complex than this one and therefore, the defendants argue, a class action is not a superior method of managing this litigation.

Finally, the defendants reassert that all the alleged class representatives' claims are barred by the applicable statute of limitations.

**B. The Parties' Contentions Regarding The Statute of Limitations
And The Defendants' Motion for Summary Judgment**

A central component of the defendants' opposition to the plaintiffs' motion for class certification is that the plaintiffs knew or should have known of the contamination affecting the Oak Ridge neighborhood before January 31, 1995, the date six years prior to the first complaint filed by the plaintiffs. The defendants assert that the environmental contamination issues associated with the facility, including the migration of groundwater contamination into the Oak Ridge neighborhood, were subject to decades of government supervision, highly publicized litigation, local media coverage, and extensive community involvement. The defendants point out that the residential property owners in Toms River even had direct contact with representatives for the defendants. Consequently, the defendants argue, Plaintiffs had actual knowledge of the contamination affecting their property and simply failed to prosecute their claims within the statutory time period.

The plaintiffs oppose the defendants' motion for summary judgment and their assertion that the plaintiffs' failed to timely file their complaint. Plaintiffs

present five grounds for denial of the defendants' motion for summary judgment: (1) the application is premature because discovery is incomplete; (2) because the groundwater contamination continues to migrate, this is a continuing tort and the statute of limitations does not apply; (3) preemption of New Jersey's statute of limitations under Section 309 of CERCLA prevents the grant of summary judgment because the EPA was still investigating the scope of the contamination; (4) that equitable estoppel precludes the defendants from benefiting from the statute of limitations because they adopted a corporate policy of fraud and deception as to the nature and the extent of their contamination and its affect upon residential properties in Toms River; and (5) that the discovery rule tolls the statute of limitations. A description of the five putative class representatives'⁸ properties and sources of information, or if one accepts Plaintiffs' allegations, misinformation, follows:

1. Kathleen Janes

Kathleen Janes has resided at 122 Sun Valley Road, Toms River, New Jersey since 1976. She purchased that property for \$56,000. Nearly twenty years later, her property was assessed for tax purposes for \$174,200. Janes has not tried to sell her property. She has refinanced her mortgage twice: first, in 1990 and again in 1997.

Janes first learned of groundwater contamination issues in the early 1980s.

⁸ Previously, John and Marilyn Nide were also named as plaintiffs. On February 19, 2002, the Court granted the Nides' motion to be removed as class representatives, but permitted the defendants to use evidence obtained from the Nides in opposition to the plaintiffs' motion for class certification.

The capping of her next-door neighbor's irrigation well alarmed her. Janes has subscribed to the Asbury Park Press, which has routinely covered the environmental issues associated with this site.

In 1991, Atlantic Coast Realty Appraisal Group approached Janes to obtain a permanent sub-surface easement within her property on behalf of defendant CIBA-GEIGY as part of their groundwater mitigation plan. Janes declined the offer because of personal problems and because she believed the easement would lower her property value.

Finally, Kathleen Janes met with counsel during the late 1990s to discuss bringing a claim against the defendants.

2. John and Ruth Tomkovich

John Tomkovich resided at 119 Oak Ridge Parkway, Toms River, New Jersey from 1969 until August 2000. John Tomkovich purchased this property for \$30,400 and sold it for \$150,000. Ruth Tomkovich never lived in the Oak Ridge Parkway home or held any ownership interest in this property; she married John on May 19, 2000.

In June 1994, John Tomkovich attended a public meeting with representatives of the defendants. During the meeting, he criticized the remediation plan and expressed his frustration regarding the contamination within the neighborhood. In particular, John Tomkovich was quoted in the June 16, 1994 Asbury Park Press saying:

What happens to the evaluation on my home?
Our ability to sell our homes will decrease.

Would you buy a home where you knew there
was a chemical pipe underneath your street?

However, John Tomkovich did not disclose any defect in the property when he sold it. He certified that there were no “toxic substances present on the property” and represented to the buyer’s attorney that “he [was] not aware of any subsurface conditions that would adversely affect the quality or value of the subject premises.”

3. Anthony and Lynn Sermarini

Anthony and Lynn Sermarini reside at 130 Sun Valley Road, Toms River, New Jersey. They purchased the property in 1969 for \$48,500. The Sermarinis have never tried to sell their home, but have refinanced it twice: first, in 1987 and again in 1996.

The Sermarinis learned of the contamination issues surrounding the defendants’ facility in or about the late 1980s to early 1990s when they learned that a neighbor’s irrigation well was closed due to chemical contamination from the facility. In the early 1990s, the Sermarinis observed the installation of a retrieval well system in their neighborhood to pump contaminated groundwater. Moreover, the Sermarinis received a letter from EPA regarding the groundwater remediation in 1994.

The Sermarinis subscribed to the Asbury Park Press, Philadelphia Inquirer, and Ocean County Observer, which all covered the Toms River environmental contamination. Moreover, the Sermarinis received copies of the

Oak Ridge Update and Sea Breeze, newsletters from the defendants, which presumably discussed the groundwater plume and its remediation objectively.

IV. DISCUSSION

A. Class Certification Requirements

Rule 4:32 governs class actions. Plaintiffs, as the party seeking class certification, bear the burden of demonstrating that they meet each of the four prerequisites set out in Rule 4:32-1(a). Under Rule 4:32-1(a), a class is appropriate only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. See also Philip Stephen Fuoco and Robert F. Williams, Class Action in New Jersey State Courts, 24 Rutgers L. J. 737 (1993).

Once this hurdle is cleared, the additional requirements of Rule 4:32-1(b)(3) must be met. This second hurdle requires that “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” R. 4:32-1(b)(3).

The court must conduct a rigorous analysis in order to determine whether the plaintiffs satisfy the prerequisites of Rule 4:32-1(a) and possesses wide latitude to address the propriety of class certification. New Jersey courts have

determined that an overarching principle of equity must be considered in the application of the class certification rule. Varacallo v. Massachusetts Mutual Life Insurance Co., 332 N.J. Super. 31, 45 (App. Div. 2000). Not only do class actions save time and money for the parties and the public, they also promote consistent decisions for people with similar claims. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 498 (App. Div. 1998)(citing In re Cadillac, 93 N.J. 412, 430 (1983)). Class actions also allow plaintiffs to redress a common grievance under circumstances that would make individual actions uneconomical to pursue. Varacallo, 332 N.J. Super. at 45.

1. Requirements of Rule 4:32-1(a)

Pursuant to Rule 4:32, as soon as practicable after the commencement of an action, the court shall determine whether the action meets the requirements of the rule and if so, whether it may properly proceed as a class action. R. 4:32-2(a).

a. Numerosity

The proposed class satisfies Rule 4:32-1(a) requiring that the class be so numerous that joinder of all class members would be impracticable. Precise enumeration of the members of a class is not necessary to satisfy the numerosity requirement. Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 405 (D.N.J. 1990); see also In re Cadillac, 93 N.J. at 425.

The class definition is a geographical one and therefore a precise one. Also, although the time period is extensive, it mirrors the defendants' conduct.

Whether that conduct resulted in the claims made by Plaintiffs is yet to be proven by the plaintiffs.

The putative class consists of former and present owners who lived in approximately 550 homes in the Oak Ridge section of Toms River. There are hundreds of class members. It is evident that joinder would be impracticable and that the size of putative class satisfies the numerosity requirement. Unlike the Kramer and Arent cases, this third case is not efficiently handled on an individual basis.

b. Commonality

Rule 4:32-1(a)(2) requires that there be questions of law or fact common to the class, “although not all questions of law or fact raised need be in common.” Weiss v. York Hospital, 745 F.2d 786, 808-809 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985) (citing 7 C. Wright & A. Miller, Federal Practice & Procedure §1763, at 603 (1972)); see also Delgozzo v. Kenny, 266 N.J. Super. 169, 185-86 (App. Div. 1993). Where class members’ factual circumstances are materially identical and the “questions of law raised by the plaintiff are applicable to each [class] member,” the commonality requirement is satisfied. Weiss, 745 F.2d at 809. “The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” Georgine v. Amchem Prod. Inc., 83 F.3d 610, 627 (3rd Cir.1996). Consequently, the commonality requirement is satisfied “[w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a

cause of action,” resulting in all of the members sharing at least one of the elements of that cause of action. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.10 (3d ed. 1992).

Likewise, common questions arise “from a ‘common nucleus of operative facts’ regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants.” In re Asbestos School Litig., 104 F.R.D. 422, 429 (E.D. Pa. 1984), aff’d in part, vacated in part sub. nom.; In re School Asbestos Litig., 789 F.2d 966 (3d Cir. 1986), cert denied, 479 U.S. 852 (1986). A common nucleus of operative fact is typically found when defendants have engaged in standardized conduct toward members of the class.” In re Life USA Holdings Inc. Ins. Litig., 190 F.R.D. 359, 366 (E.D. Pa. 2000), Accord Kugler v. Romain, 58 N.J. 522, 540 (1971). The existence of questions concerning individual representation made to plaintiff or relating to proof of damages, should not be a bar to upholding a class action where there are significant common questions as to liability. Delgazzo, 266 N.J. Super. at 185.

The commonality requirement is met because the cause of the alleged harm facing class members is a single course of conduct of the defendants at the facility. Obviously, the defendants’ release of pollutants and their subsequent response to the contamination led to the class members’ claims. This course of conduct is identical for each class member.

c. Typicality

The class also satisfies Rule 4:32-1(a)(3) requiring that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” R. 4:32 1(a)(3). As discussed above,

When the same unlawful conduct was directed at or affected both the named plaintiffs and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that may underlie individual claims. Canon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 544 (D.N.J. 1999).

The New Jersey Supreme Court has stated that “[t]he claims of the representatives ‘must have the essential characteristics common to the claims of the class.’” In re Cadillac, 93 N.J. at 425 (quoting 3B Moore's Federal Practice ¶23.06-2 (1982)). However, the requirement “does not mandate that all putative class members share identical claims.” Barnes v. American Tobacco Co., 161 F.3d 127, 141 (3rd Cir.1998). Moreover, “even relatively pronounced factual differences will generally not preclude a finding of typicality where ... the claim arises from the same practice or course of conduct.” In re Prudential Ins. Co. of America Sales Practice Litigation, 148 F.3d 283, 311 (3rd Cir.1998)(quoting Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 58 (3rd Cir.1994)).

The typicality inquiry here centers on whether the named plaintiffs’ individual circumstances are markedly different or the legal theory upon which their claims are based differs from those of other class members. See Eisenberg

v. Gagnon, 766 F.2d 770, 786 (3rd Cir.1985). The purpose of the typicality requirement is to bar class certification only when “the legal theories of the named representatives potentially conflict with those of the absentees.” Georgine v. Amchem Products, Inc., 83 F.3d 610, 631 (3rd Cir.1996). If the claims of the named plaintiffs and putative class members involve the same conduct by the defendants, typicality is established regardless of factual differences. Barnes, 161 F.3d at 141; see also Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.15 (3d ed. 1992) (“Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.”).

Typicality is met given that the claims of the putative class representatives are all Oak Ridge homeowners and thus within the geographic boundaries of the proposed class, and because their property interests have been allegedly damaged by contamination, affecting the value of their real property. These claims are no different than those of the other putative class members.

d. Adequacy of Representation

Rule 4:32-1(a)(4) mandates two elements for the adequacy of representation:

- (1) the plaintiff’s attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and
 - (2) the plaintiff must not have interests antagonistic to those of the class.
- Delgozzo, 266 N.J. Super. at 188.

The defendants bear the burden of demonstrating that the proposed representation will be inadequate. Id. Defendants contend that the representation in this case is not adequate, asserting that some of the proposed class members have conflicting claims with other members of the class.

The court agrees with plaintiffs that their attorneys are qualified and experienced to conduct this litigation. Class counsel has the requisite experience, skill, and competency in dealing with class actions and complex civil litigation.

The court also disagrees with the defendants' contention that some of the proposed class members have conflicting claims with other members of the class. As plaintiffs point out, no members of the proposed class have claims pending against another member. The class representatives do not have interests antagonistic to those of other class members. In fact, the putative class representatives' claims of diminished property value are identical to those of other class members.

The court finds no other reason to question the adequacy of the class representatives or class counsel. Accordingly, the court finds plaintiffs have met the last element of Rule 4:32-1(a).

2. Requirements of Rule 4:32-1(b)(3)

Since the plaintiffs have successfully met the requirements of Rule 4:32-1(a), the court must determine whether they have satisfied the two requirements of Rule 4:32-1(b)(3). Under Rule 4:32-1(b)(3), the plaintiffs must show that "questions of law or fact common to the members of the class predominate over

any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” R. 4:32-1(b)(3). Considerable overlap exists between Rule 4:32-1(a)(2)’s commonality prerequisite and Rule 4:32-1(b)(3). A finding of commonality will likely satisfy a finding of predominance. Mejdreck v. The Lockformer Company, 2002 WL 1838141 (N.D.Ill.)(citing Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 667 (N.D.Ill. 1989)).

a. Predominance of Common Issues

Predominance focuses on “whether the potential class, including absent class members, seeks ‘to remedy a common legal grievance.’” In re Cadillac, 93 N.J. at 431; see also Delgozzo, 266 N.J. Super. at 189; accord, 7A Wright & Miller, *Federal Practice & Procedure*, 1778 at 53-54 (1972) (common issues predominate when common issues represent a significant aspect of the case). Unlike commonality, predominance is significantly more demanding, requiring more than a common claim. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 159 F.3d 154, 187 (3rd Cir.2001)(citing Amchem, 521 U.S. at 623). The critical consideration is whether there is a “common nucleus of operative facts” among all the class members. Carroll, 313 N.J. Super. at 499.

Defendants argue Plaintiffs do not satisfy Rule 4:32-1(b)(3) because individual questions of fact predominate over questions common to the entire class. Defendants support this proposition by putting forth the same argument as they did regarding commonality and typicality: the proposed class members’

properties are so different that it would be impossible to try this case as a class action, as issues of causation and damages would require individualized proof. Judge Posner of the Seventh Circuit Court of Appeals considered a similar argument in a similar groundwater contamination case. Mejdrech, et al v. Met-Coil Systems, Corp., 319 F.3d 910 (7th Cir.2003). The Seventh Circuit affirmed class certification, reasoning that:

If there are genuinely common issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining claimant-specific issues to individual follow-on proceedings. Id. at 3 (citing Hardy v. City Optical Inc., 39 F.3d 765, 771 (7th Cir.1994); In re Hanford Nuclear Reservation Litigation, 292 F.3d 1124, 1133-35 (9th Cir.2002); Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1200 (6th Cir.1988); Weiss v. York Hospital, 745 F.2d 786, 809 (3rd Cir.1984); Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 17.10 (3d ed. 1992)).

Plaintiffs correctly claim that the common question of whether Defendants contaminated the area in question is not only shared by all proposed class members, but predominates over any differences between the individual properties. Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir.1988). Likewise, Plaintiffs correctly claim that the purpose of the defendants' campaign about the nature, extent and danger of the pollution they released into the Toms River community also predominates over any differences between the

individual class members' knowledge of the plume or the contamination.

Property damage cases are generally seen to raise common questions sufficient to warrant class treatment unlike personal injury or products liability cases. The core common questions of pollution, e.g., the details of the plume, are not only common amongst the class members, they predominate. This court can address the remaining individual questions, such as whether there was unlawful contamination, what the geographical scope of the contamination is, and whether the plaintiffs' complaint was timely filed, at a later date. Assuming that the plaintiffs' complaint was timely filed, individual class members must still prove that the defendants contaminated their respective properties and the extent of their individual injuries.

b. Superiority

Rule 4:32-1(b)(3) also requires that a class action be a superior method of adjudication of the controversy. Superiority calls for a determination that a class action is the best method of achieving a fair and efficient adjudication of the controversy. This rule is fleshed out in the Cadillac opinion. However, "implicit in the determinations of predominance and superiority is an identification of the issues." Cadillac, 93 N.J. at 426. This review is less penetrating than that required by the court on a motion for summary judgment or at trial. See id.

Fairness to the parties is of paramount concern in this class action certification decision. The fairness objectives of the class action vehicle are well known. See e.g. Charles W. Schwartz, Class Certification for Environmental and

Toxic Tort Claims, 10 Tul. Envtl. L.J. 187, 231 (1997). Both plaintiffs and defendants have an interest in fairness in the litigation process that can be advanced through a class action. For example, in a groundwater contamination case, a class action can provide greater manageability at a significantly lower cost than individual property loss suits. See Mejdrech v. Met-Coil Systems Corp., 319 F.3d at 911. More importantly, however, the preclusive effect of a class action will benefit both parties because it will provide closure to all parties by bringing this dispute to an end. Consequently, a class action is an extremely fair approach to this case.

The plaintiffs claim that a class action is superior for three reasons. First, there is a need to pool costs. Second, there is no other property damage litigation pending for this putative class and no meaningful alternative for these property owners at this time. Third, the difficulties that might be likely in managing a class are limited in this case. This court agrees that the class action vehicle is superior to other methods of adjudication in this matter.

Plaintiffs have also met the requirements under Rule 4:32-(b), demonstrating both the predominance of common issues and the superiority of a class action over other available trial techniques. The facts in this case suggest a similar, unified scheme to defraud and that there was a company wide systematic deception practiced in a similar fashion upon all of the members of the putative class, hence, common issues predominate.

Property damage cases are generally seen to raise common questions sufficient to warrant class treatment unlike personal injury or products liability cases. The core common question of pollution, i.e., the details of the plume, are not only common amongst putative class members, they predominate. The remaining individual questions relate to allocation of damages.

This court does not find the putative class representatives' interests antagonistic to those of other class members. Accordingly, this court will certify the class of property owners. This court recognizes the holding in Goasdone v. American Cyanimid Corp., 354 N.J.Super. 519 (Law Div. 2002), which recognized that “the multiplicity of individual issues” among the members of the proposed class bars both (b)(2) and (b)(3) certification. This court agrees with the Goasdone decision under the facts presented in that case, where the putative class sought workplace medical monitoring and personal injury damages. However, those facts are inapposite to the present case as this case solely involves property damage. Accordingly, Judge Posner’s reasoning in Mejdrech, et al v. Met-Coil Systems, Corp., 319 F.3d 910 (7th Cir.2003) is clearly more persuasive.

B. Defendants' motion for summary judgment

Pursuant to Rule 4:46-2, summary judgment is proper when no genuine issue of material fact is presented. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1955). Rule 4:46-2 provides the standard for a motion for summary judgment: summary judgment shall be entered where the pleadings, depositions, answers to interrogatories, and admissions show there is no genuine issue as to any material fact challenged and the moving party is entitled to a judgment as a matter of law. In deciding whether a genuine issue as to a material fact exists, the court must consider, with the evidence viewed in the light most favorable to the non-moving party, whether the evidence would allow a rational fact finder to resolve the dispute in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

The critical issue in this motion for summary judgment is whether Plaintiffs commenced their action within the applicable statute of limitations, which is a common question in cases involving groundwater contamination. William B. Johnson, Annotation, Application of Statute of Limitations in Private Tort Actions Based on Injury to Persons or Property Caused by Underground Flow of Contaminants A.L.R.5th 438 (1993)(“Statute of limitations questions frequently arise in cases involving the subsurface flow of contaminants from their source to other property.”).

Defendants seek summary judgment pursuant to N.J.S.A. 2A:14-1, which sets the applicable statute of limitations in this case. According to N.J.S.A. 2A:14-1, “[e]very action at law for trespass to real property, for any tortuous injury to real or personal property, for taking, detaining, or converting personal property,... shall be commenced within six (6) years after the cause of any such action shall have accrued.” The defendants assert that the plaintiffs’ complaint was not filed within the six-year period. This court must now determine when the plaintiffs’ cause of action accrued and whether it was timely filed. Baird v. American Med. Optics, 155 N.J. 54, 65 (1998). If the plaintiffs’ claims were not timely filed, their claims may be time barred.

However, under the discovery rule, the court is given discretion to ameliorate the harsh results caused by strict adherence to the statute of limitations. Id. The discovery rule provides that an action accrues when the injured party discovers or should have discovered the claim. Baird, 155 N.J. at 65 (quoting Lopez v. Swyer, 62 N.J. 267, 272 (1973)). The burden is on the plaintiff, with the evidence viewed in her favor, to show that the discovery rule should be applied. Lopez, 62 N.J. at 276. The cause of action accrues whenever the facts would alert a reasonable injured person that her injuries were possibly the fault of another. Baird, 155 N.J. at 68. The discovery rule is especially useful in the toxic tort context.

In the toxic tort context, there is a necessity for reasonable medical information before plaintiff may be deemed to have the requisite knowledge for

accrual of a toxic tort cause of action. Vispiano v. Ashland Chemical Co., et al, 107 N.J. 416, 435 (1987)(holding in a toxic tort case that an employee's history of migraine headaches, the role of stress in causing such migraines, the fact that medication played a partial role in cure of migraines, and the fact that employee's headaches stopped after he left employment at toxic waste plant were insufficient to place employee on notice that exposure to chemicals might have caused his symptoms), paraphrasing Mancuso v. Mancuso, 209 N.J. Super. 51 (App. Div 1986).

As to discovering the existence of an actionable claim, certainty is not required. The discovery principle applies at the point a plaintiff perceives an injury with the degree of certainty that would lead a reasonable person to investigate the matter if he is interested in seeking redress. Staub v. Eastman Kodak Co., 320 N.J. Super. 34, (App. Div.), cert denied, 161 N.J. 334 (1999). After reaching this point, a potential plaintiff still has the applicable limitations period in which to decide whether a suit is warranted but if he does not sue within this time, he is barred. Id. at 45-46. Also, where the defendant has unclean hands in giving an altered explanation to alleviate the plaintiff's concerns, this contributes to an argument against a time-barred claim. Alfone v. Sarno, 139 N.J. Super. 518 (App. Div. 1976).

The discovery rule provides that a cause of action will not accrue until the injured party discovers, or by an exercise of reasonable diligence should have discovered the she may have a basis for an actionable claim. Lopez v. Swyer, 62 N.J. at 272.

The defendants argue that the discovery rule is not applicable in this case

because the class representatives actually knew of the contamination at issue in the mid-1980s, well before January 31, 1995. Thus, according to the defendants, the statute of limitations bars the instant action as a matter of law. The defendants' current motion for summary judgment is directed towards the five class representatives only.

The defendants contend that each class representative actually knew about the groundwater contamination and its alleged effect on their property based on full disclosures by the defendants and the federal and state governmental agencies who have monitored the remediation since the mid-1980s.

Plaintiffs argue that there is a disconnect between generalized knowledge of pollution in an area and actual knowledge of pollution on or underneath their properties. Plaintiffs, relying upon Loughlin v. United States, 230 F.Supp. 2d 26, 40 (D.D.C. 2002), assert that knowledge that there was pollution under their own specific properties, as opposed to offsite or in the neighborhood generally is required. Under Defendants' theories, according to the plaintiffs, the statute of limitations would commence to run the date any contaminated site receives negative publicity. Plaintiffs assert that this is contrary to established law; knowledge of contamination at or on a Superfund site does not equate with knowledge of groundwater contamination impacting other properties.

Plaintiffs' argument that, as a matter of law, property damage claims associated with a release from a federal Superfund site cannot begin to run until after the completion of the federally mandated cleanup is unpersuasive. Plaintiffs

assert that Section 309 of the CERCLA preempts the accrual date of New Jersey's limitations.

Section 309 sets a federal minimum standard for accrual dates in actions brought under state law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.... 42 U.S.C. § 9658(a)(1). According to the relevant portion of Section 309, if the applicable state statute of limitations period provides a commencement date that is earlier than the federally required commencement date, "such period shall commence at the federally required commencement date in lieu of the date specified in such state statute." Id. However, this section is only applicable if state law provides for an earlier accrual date than that established by federal law. If state and federal law reach the same accrual date or if state law provides additional time, state law is applicable. See id.

The federally required commencement date in this case would be the date plaintiffs knew or should have known that the property damages were caused or contributed to by the defendants' contamination. 42 U.S.C. § 9658(b)(4)(A). Similarly, New Jersey's discovery rule provides that an action accrues when the injured party discovers or should have discovered the claim. Lopez, 62 N.J. at 272. Under both federal and New Jersey law, the statute of limitations would begin at the same point and the ultimate accrual date under either provision would be the same. Accordingly, because the two laws reach the same result, Section

309 does not preempt.

Plaintiffs also posit that litigation would interfere with the paramount public interest in cleaning up polluted sites, in making the maximum amount of private money available to mitigate damages, and in encouraging adjacent property owners to cooperate in the cleanup effort. New Jersey law, according to Plaintiffs, would not penalize individuals who elected to wait to sue and work with the process. Moreover, Plaintiffs argue that New Jersey public policy favors delayed litigation in cases involving adjacent property owners until the completion of the federally supervised remedial or response action.

The plaintiffs advance two avenues to this conclusion: first, the commencement of the statute of limitations period cannot occur until the contamination at issue is removed, or is prevented from migrating farther. Second, plaintiffs proffer that, under New Jersey law, adjacent property damages to an NPL facility do not begin to run until the cleanup of the subject release into the environment is completed, unless that neighbor knows of physical damage to his or her property and is told that the cleanup will not address the same. The first avenue is unpersuasive; cleanup of contaminated sites can take decades. This court is not willing to vitiate the value of the statute of limitations entirely by allowing a complaint to be filed upon the completion of decades of historical contamination.

N.J.S.A. 2A:14-1 is a statute of repose “designed to stimulate litigants to prosecute their causes of action diligently and to spare the courts from litigation

of stale claims.” Vispiano, 107 N.J. at 426. The purpose of statute of limitations is to penalize dilatory plaintiffs who fail to bring suit when they either know or should have known that they may have suffered an injury. Id. at 437. Admittedly, Plaintiffs have offered evidence that suggests that the defendants misled residents about the extent of the contamination in their community. However, most of the plaintiffs’ evidence predates January 31, 1995 significantly. Consequently, there are issues surrounding application of the discovery rule and whether the statute of limitations should be equitably tolled. Indeed, in the face of the documents presented by plaintiffs showing the lengths to which the defendants went to avoid admitting responsibility and their reluctance to inform the public that pollution from the facility was reaching the plaintiffs’ properties, application of the statute of limitations may be inequitable.

The critical issue in this motion for summary judgment is whether the plaintiffs knew or should have known that they may have had claims against the defendants by January 31, 1995. With the record before this court, there are ample questions surrounding the information that was disseminated to the public, the purpose of this information – whether to inform or deceive the public – and the knowledge possessed by other class members.

The evidence shows that the groundwater contamination in the Oak Ridge neighborhood was the subject of nearly two decades of governmental supervision, intense media coverage, highly publicized litigation, and extensive organized community involvement. Accordingly, Plaintiffs had generalized knowledge of

the pollution caused by the defendants near and at the facility, but may have lacked actual knowledge of the contamination underneath their properties. Moreover, the knowledge possessed by individuals is likely to vary significantly depending upon a variety of factors, e.g., interaction with representatives of the defendants, interaction with administrative agencies, subscriptions to local and national newspapers. Consequently, while some plaintiffs may have had a basis for an actionable claim, other plaintiffs may not have had a basis for an actionable claim until the agency studies were completed. See Lapka v. Porter Hayden Co., 162 N.J. 545, 548 (2000).

Recently, the New Jersey Appellate Division in Provini v. Asbestospray Corp. et al, 2003 WL 21106090 (App. Div. 2003), affirmed dismissal on summary judgment in a toxic tort asbestos case where the plaintiff was unable to provide adequate evidence of exposure. Reaffirming Sholtis v. American Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989), the court recognized that plaintiff in an asbestos exposure case must present *prima facie* evidence of “an exposure of sufficient frequency, with a regularity of contact, and with the product in close proximity” in order to hold a defendant strictly liable. Provini v. Asbestospray Corp. et al, 2003 WL 21106090 (App. Div. 2003). In Provini, the plaintiff’s inability to provide adequate evidence of exposure warranted dismissal on summary judgment. Here, analogously, the plaintiffs lack evidence of the dimensions of the plume and the scope of the contamination while the defendants seek summary judgment. However, in this case the lack of evidence justifies

denial of summary judgment because important questions regarding the plume and its contaminants still exist. For example, it is still unclear how far the plume extends beyond the boundaries of the facility. Consequently, factual questions involving the extent of contamination in the Oak Ridge section of Toms River and whether the plaintiffs' properties have been contaminated favor denial of the defendants' motion for summary judgment.

Defendants have made a strong case for dismissal based on the statute of limitations but they are unable to convince this court that Plaintiffs knew of an actual trespass to their properties. Defendants have presented extensive documentary and testimonial evidence of plaintiffs' knowledge of generalized pollution problems and issues associated with the facility. At the same time, the plaintiffs have provided ample evidence that indicates the defendants' efforts to deny that the plaintiffs' properties have been damaged or that any such damage is the result of chemical contamination or that the plume had even reached the plaintiffs' property. Indeed, the defendants have not presented this court with disclosures to the plaintiffs of the plume and its contaminants or the nature and extent of the contamination from their site.

This court is uncertain, on the record presently before it, that the fraud alleged by Plaintiffs occurred. This uncertainty causes this court to hesitate to grant the defendants' motion for summary judgment at this time, where questions regarding the quality and purpose of the information provided to the public exist. Conversely, if the information proves to be accurate and the defendants' purposes

innocuous, a finding that the plaintiffs failed to pursue their claims when they knew or had reason to know would no longer trouble this court. Such a finding, may also give rise for a motion to decertify the class.

Consequently, given the wide-reaching ramifications of this motion for summary judgment and the questions regarding the information provided by the defendants to the class members, this court will conduct a Lopez hearing to resolve factual questions relating to the remaining class members and the statute of limitations.

IV. CONCLUSION

For the reasons stated above, the court hereby grants the plaintiffs' motion for class certification and denies the defendants' motion for summary judgment without prejudice. Pursuant to Lopez v. Swyer, 62 N.J. 267 (1973), this court will conduct an evidentiary hearing to resolve factual questions relating to the statute of limitations. The parameters and conditions of the Lopez hearing and any further discovery will be set forth during a future case management conference.